IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-781

PENTAGON CITY COORDINATING COMMITTEE, INC., ET AL,
Petitioners,

v.

THE ARLINGTON COUNTY BOARD, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTION AND STATUTES:

IN THE

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Petitioners Pentagon City Coordinating Committee, Inc., John H. and Joan C. Quinn, D. Derk Swain, Richard J. and Deborah Herbst, and Robert F. and Calista L. Steadman request that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia in this case.

OPINIONS BELOW

The opinion and order of the Circuit Court for Arlington County (of Arlington County, Virginia) are

not reported but appear in Appendix A to this petition. The orders of the Supreme Court of Virginia denying an appeal and denying a petition for rehearing are set forth in Appendix B.

JURISDICTION

The order of the Supreme Court of Virginia denying petitioners' timely petition for rehearing was entered on September 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

This case presents a novel question of procedural due process arising out of the duty of a state zoning body to consider and weigh the various public welfare factors affecting a specific rezoning proposal and to reach a rational balance as among those factors. The precise question presented is as follows:

Where a state zoning body is considering whether to authorize the "high-rise development" of a large urban tract of land in a way which will have a direct adverse impact upon the property, property values, and health of neighboring residents, and where the zoning body has been forewarned by a sister governmental agency and nearby property owners that the proposed development will cause an apparently insoluble public welfare problems of unmeasured dimensions (in terms of traffic, pollution, and declining property values), may that zoning body properly approve the proposed development without undertaking to ascertain the dimensions of the public welfare problem involved—or does such approval deprive the adversely affected property owners of procedural due process in violation of the Fourteenth Amendment?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides in pertinent part as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On February 25, 1976, the County Board of Arlington County, Virginia, rezoned a large centrally-located tract of land within the County. On June 3, 1976, these petitioners filed suit in the Circuit Court of Arlington County, Virginia, seeking a declaratory judgment to the effect, *inter alia*, that the County Board's decision had violated petitioners' rights under the Fourteenth Amendment. At the conclusion of the trial the trial court dismissed all of petitioners' claims, and the Supreme Court of Virginia denied an appeal.

Although the trial record is substantial, the factual predicates for petitioners' constitutional claim are virtually undisputed. As further demonstrated below, the issue raised by the present petition for certiorari is purely a legal issue which can readily be resolved by this Court. The relevant undisputed facts are as follows:

(1) Arlington County, Virginia, lies on the southern shore of the Potomac River, and, as a central part of the Greater Washington Area, has been the subject of

intense high density real estate development. Among the prominent high density developments within the County are the Rosslyn Circle development and the Crystal City development, with other major projects scattered in between. (*See, e.g.,* PX 6 at 8; PX 10 at 10; PX 4 at 2-3).[1]

(2) The last large undeveloped tract of land within Arlington County is a 116-acre tract known as "the Pentagon City tract", which lies southwest of the Pentagon Building, the headquarters of the U.S. Department of Defense. (PX 6 at 8).

(3) To the west of the Pentagon City tract is a single-family residential neighborhood known as "the Arlington Ridge neighborhood". According to a report approved by the Arlington County Board, the Arlington Ridge neighborhood has been seriously impacted by the high density development that has already occurred within the County. According to the report,

> "The principal threat to the Arlington Ridge residential neighborhood . . . comes from the impact of high density redevelopment, or commercial activities mostly along the outer perimeters of the area. *Excessive traffic, commercial parking, noise, pollution, and sometimes proximity to high-rise buildings have reduced desirability for single-family use and encouraged home sales . . . .*" (PX 4 at 8, emphasis added).

Thus the respondent here, the Arlington County Board, has recognized that the high density of the

[1] The abbreviation "PX" refers to exhibits offered by petitioners at the trial. References to Roman numerals are to the indicated volume of the trial transcript.

Pentagon City tract will have a direct adverse impact upon the property values of these petitioners, all of whom are residents of the Arlington Ridge neighborhood.

(4) In late 1975 the owners of the Pentagon City tract submitted to the Arlington County Board an elaborate proposal for rezoning the tract to allow the construction of a huge physical plant, including a series of 22-story buildings with a vast physical capacity. As finally approved by the Board, upon completion in 1990 the development will encompass 1,250,000 square feet of office space, 2,000 hotel rooms, an 800,000 square foot shopping center, 6,200 apartment units, and a 300-bed nursing home. (PX 2).

(5) In submitting their proposal the owners were required to, and did, submit a technical traffic engineering study as to certain aspects of the traffic conditions which would exist on the tract when construction had been completed in 1990. (PX 10 at 50). That study showed, without dispute, that at three specific traffic intersections on the tract "jammed traffic conditions" would occur in both the morning and evening rush hours, with resulting "back-ups" or queues of vehicles which might potentially affect the entire traffic network of the area. (XXIII at 24-26; PX 11 at 130). Since the report did not undertake to analyze the effect of those queues of vehicles on the area traffic network, there was no analysis of what the total traffic picture would be upon completion of the proposed development. (XIII at 135-36).[2]

[2] The report analyzed each intersection as though it would exist entirely independent of the rest of the traffic system. (Id.). Although it would have been perfectly feasible (as subsequently

(6) Recognizing its own inexpertise with respect to traffic problems, the Arlington County Board has created a special agency, the Arlington County Transportation Commission, to advise the Board on the traffic consequences of proposed developments. (PX 14; IV at 19). That commission reviewed the Pentagon City developers' traffic engineering study while the developers' proposal was pending before the Board, and the Commission then reported to the Board as follows:

> "No [development plan] for Pentagon City should be approved by the County Board because *no reasonable assurance presently exists that severe traffic congestion in the development area can be avoided.*" (PX 17; VI at 32; emphasis added).

In other words, judging simply by the developers' incomplete traffic analysis, the Commission foresaw the possibility of an unacceptable level of area-wide traffic congestion and warned the Board that it should not authorize development of the tract until further investigation might provide some reasonable assurance that the problem could be solved. Various citizens and citizens associations gave similar warnings to the Board.

(7) Although the Arlington County government employs a number of traffic engineers, neither those staff engineers nor the developers' own traffic consultant made any effort, prior to the Board's approval of the developers' proposal, to analyze the "back-up" relationships between the intersections and thus to assess

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demonstrated at the trial) for a trained traffic engineer to analyze the inter-relationships as among the intersections and thus present a complete traffic picture (see, e.g., PX 31; PX 33), the report did not do so.

the severity of the traffic jams that would exist on the tract as a whole. (XVII at 24; XIII at 135-36). Thus, when the Board approved the proposal on February 25, 1976, it had made no effort to evaluate or understand the reasonably foreseeable traffic consequences of its action.

(8) Before it reached its decision the Board was also clearly forewarned of the possibility that the traffic congestion which would be created by the new development would in turn result in dangerous levels of air pollution, and the Board was also advised of the need for a scientific examination of the air pollutional consequences before the project could safely proceed. (PX 44 at 2). But instead of making such an investigation the Board approved the development and *immediately thereafter* voted to establish a new task force to study such air pollutional problems in the future. (PX 7). Here again, therefore, the Board approved the project without bothering to evaluate or understand the consequences of its action.

(9) The developers in this case contend, perhaps properly, that under the law of Virginia the Board's action of February 25, 1976, conferred upon the developers a vested right to proceed in accordance with the Board's approvals of that date. (Intervenors' Answer to Interrogatory No. 7).

(10) In their petition for a declaratory judgment in the trial court below these petitioners stated the following constitutional claims:

> "32. Under the Fourteenth Amendment to the Constitution of the United States, the defendants on February 25, 1976, had an affirmative legal duty, prior to promulgating the zoning ordinance requested by the developers, to make a rational

assessment of the degree to which that ordinance (and consequent development of the Pentagon City tract) would impact upon the plaintiffs' rights to enjoy their property and existing public facilities free of unjustifiable interference.

"33. The Board's decision of February 25, 1976, constituted a violation of the foregoing constitutional duty in that the Board failed to make a rational evaluation of the degree to which the plaintiffs and other members of the public would be adversely affected by traffic congestion on the public highways in and around the Pentagon City tract and by environmental pollution of the neighborhood within which the plaintiffs reside."

(11) In support of the foregoing constitutional claims the petitioners adduced clear expert testimony demonstrating by statistical analysis that the queues of vehicles which would be "backed up" at three intersections on the tract would reach lengths of more than a mile and would thus back up into and "jam" virtually all of the major traffic intersections in the area, including those within the tract and those at which the tract's internal street system connects with the surrounding highway network. (See, *e.g.*, PX 31; PX 33; V at 36-37). Although the Board and its staff could have made the studies necessary to see the full traffic picture, they did not do so prior to approving the developers' proposal.

(12) To illustrate the severity of the traffic conditions that will exist on the tract, there was uncontradicted expert testimony that during the morning and evening rush hours vehicle speeds in the affected area will routinely be reduced to approximately 1 mile per hour, with staggeringly long waits simply to get through the affected intersections. (See, *e.g.*, V at 39-44, 48-49).

(13) None of the witnesses at the trial, including the witnesses called on behalf of the Board and the developers, could identify any method for eliminating or alleviating the total "breakdown" in the traffic system which is so clearly indicated by the trial evidence. (II at 26). Judging by the present record, there simply is no way to avoid such a "breakdown" if the Board-approved Pentagon City project goes forward.

(14) With respect to air pollution, the trial record shows, *inter alia*, (a) that "photochemical oxidants" created by vehicle emissions are dangerous to human health (VII at 90); (b) that today photochemical oxidants have already reached dangerous levels in the area (XXI at 71-72, 76); (c) that in 1990, even if strict automobile emission control programs are instituted, there will be a dangerous photochemical oxidant condition in the region in 1990, whether or not the Pentagon City development is constructed (XVI at 23, 137); (d) that if the proposed high-density development goes forward on the Pentagon City tract, resulting in "jammed" traffic conditions in the area, the project will seriously exacerbate the situation in terms of human health (VII at 108-109); and (e) that each of these propositions was literally undisputed at the trial. Although the Board was warned that the possibility of such air pollutional conditions should be scientifically investigated (PX 44 at 2), it quite consciously and deliberately decided to postpone any investigation until after it had approved the Pentagon City project. (PX 7).

(15) With all due respect to the trial judge, his opinion reflects a plain misunderstanding of the record with respect to the proceedings before the Board and the nature of the traffic and air pollutional problems

which the Board failed to investigate. The opinion's handling of those two problems was, in sum, as follows:

(a) The trial judge treated the traffic problem as though the Board itself had heard expert testimony indicating that jammed traffic conditions would *not* result from the Pentagon City development. The trial court's opinion states flatly as follows:

> "When qualified exports are in genuine disagreement in their forecasts of [traffic] conditions in 1990, then for the county board to accept one view or the other is neither arbitrary nor capricious." (App. A at 8a).

It is truly indisputable, however, that during the Board's hearings there was no "disagreement" among any traffic "experts"; in fact, only one such "expert" presented a traffic "forecast" to the Board, and he was the developers' traffic engineer, who was forecasting traffic jams at only three points (without analyzing their effects). Thus the trial court not only misunderstood what had transpired before the Board but also missed the essential point that the Board had failed to make any reasonable investigation of the total traffic picture.

(b) The trial court's reasoning with respect to the air pollutional issue was similar. On that subject the opinion made two points. First, it was stated that "reasonable men may differ" as to whether there will be dangerous photochemical oxidant levels on the tract in 1990 (App. A at 4a)—as though, again, the Board had heard conflicting testimony and had considered and resolved the issue. In fact, there was no such difference of opinion before the Board, and the Board quite consciously declined to consider the issue at all,

deciding instead to approve the project immediately and consider its air pollutional consequences only when it would be too late to make any difference.

Secondly, the trial court's opinion suggested that "man's knowledge" of photochemical oxidant pollution is not complete and that the proposed project should not be delayed because of any worries on that score (App. A at 4a). That suggestion, however, completely overlooks the undisputed scientific trial evidence showing that the projected traffic jams on the Pentagon City tract are bound to exacerbate a photochemical oxidant situation which would be dangerous in any event (see p. 9, *supra*). The latter fact would have been quickly discovered by the Board if it had undertaken even a cursory investigation of the problem.

(16) Following the trial court's denial of their petition for a declaratory judgment, petitioners filed a timely petition for leave to appeal to the Supreme Court of Virginia. The petition asserted the Federal constitutional claims raised in the trial court, but the petition was summarily denied on July 28, 1977. A timely petition for rehearing was summarily denied on September 2, 1977.

ARGUMENT

As a threshhold factual matter it is clear that the challenged decision of the Arlington County Board will have a direct adverse impact upon the property interests of the present petitioners and that the petitioners are therefore in a position to present the constitutional claims here asserted.

The facts on this score are simple. As a general matter the United States Congress itself has expressly

found "that the growth in the amount and complexity of air pollution brought about by urbanization . . . and the increasing use of motor vehicles has resulted in mounting dangers to the public health and welfare . . . [and] damage to and the deterioration of *property* . . . ."[3] But more importantly, in this case the respondent itself, the Arlington County Board, has verified the fact that a high-rise development adjacent to the neighborhood in which these petitioners live will have the direct result of reducing the desirability of the neighborhood, encouraging home sales, and thus depressing the values of the properties of these petitioners (see p. 4, *supra*). Since the property rights of the instant petitioners are fully as deserving of constitutional protection as the property rights of (for example) the owners of the Pentagon City tract, we can turn immediately to the question whether the Arlington County Board in this case afforded petitioners procedural due process.

This Court has made clear in a series of zoning cases that it is the function of a zoning body, when considering a specific zoning proposal, to weigh the various factors for and against the proposal in the light of the public welfare. Where the zoning body has engaged in this weighing process and reached a conclusion about which reasonable men may differ, then it is said that the zoning result is "fairly debatable" and must be judicially affirmed. *See, e.g., Village of Euclid, Ohio* v. *Ambler Realty Co.*, 272 U.S. 365, 387 (1926). Conversely, where the zoning decision is one which no reasonable man could have reached and is thus not "fairly debatable", then due process requires that the decision

[3] 42 U.S.C. § 1857(a)(2) (emphasis added).

be set aside as bearing no "rational relationship to permissible State objectives." *Moore* v. *City of East Cleveland, Ohio*, —— U.S. ——, 97 S.Ct. 1932, 1935 (1977).

Implicit in this reasoning process are the clear dual premises (1) that every state zoning body has an affirmative duty to weigh the various factors, pro and con, and reach its own decision as to where the public welfare lies, and (2) that it would be constitutionally improper for such a body either to refuse to consider the various factors or to promulgate a zoning decision without having done so if private property interests would be adversely affected thereby. To hold otherwise, we submit, would be to say that a state instrumentality can deprive a person of property without affording him procedural due process.

The point is illustrated by the case of *Citizens Association of Georgetown, Inc.* v. *Zoning Commission of D.C.*, 155 U.S. App. D.C. 233, 477 F.2d 402 (D.C. Cir. 1973). There the court undertook to decide, consistent with the prior decisions of this Court, whether a challenged zoning decision had a "substantial relationship to the public welfare", but from the record in that case it was unclear whether the zoning body had considered one of the possible factors affecting the public interest, namely, the environmental impact of the challenged decision. The court stated as follows:

> "Where, as here, the potential environmental effects of the Commission's decision are substantial, *it must at least consider* the environmental issue to fulfill its *public interest mandate*. The judgment as to environmental impact is a determination of policy committed to the discretion of the Commission alone; and where the Commission

> has *struck a balance* between environmental and other factors, we will not reverse its decision simply because we would have attached different *weights* to the competing interests at stake." 233 U.S. App. D.C. at 241, 477 F.2d at 410.

Similarly, in considering whether zoning bodies have acted arbitrarily and capriciously, the state courts appear to be unanimous in the view that every such body has a duty "to consider the effect" of the proposed development in terms of any potential public welfare problems brought to that body's attention. See, *e.g., Vece* v. *Zoning and Planning Commission,* 148 Conn. 500, 172 A.2d 619 (1961); *Brandon* v. *Board of Commissioners,* 124 N.J.L. 135, 11 A.2d 304 (1940); *Price* v. *Cohen,* 213 Md. 457, 132 A.2d 125 (1957).

The foregoing reasoning, not to mention common sense, leads inevitably to the conclusion that where a zoning body has been told that a particular zoning proposal is likely to have a serious, but as yet unmeasured, adverse impact upon the public welfare and private property rights, the zoning body may not properly approve the proposal without having "at least considered" and to some extent evaluated that impact. Otherwise a zoning body would be free simply to ignore both the public welfare and affected private property rights—and that simply cannot be consistent with the Due Process Clause.

We submit that it is self-evident that this issue is one of enormous potential importance for American society. Congress itself has recently recognized the obvious fact that, as urbanization and urban congestion proceed apace, the "land-use and transportation controls" formulated by state zoning bodies throughout the country are bound to have a major impact upon

the quality of American life in the future,[4] and we respectfully submit that it is time for this Court to make clear that in this field of governmental activity there is at least one minimal protective procedure which is required by the Fourteenth Amendment—namely, that when a zoning body has been alerted to the fact that a proposed development may lead to a potentially serious public welfare problem having a direct effect on private property rights, that zoning body has a duty to evaluate and "at least consider" the consequences of what it is being asked to approve before it acts.

We also submit that the present case is a proper vehicle for announcing this fundamentally important principle. Here a public agency with particular expertise in a relevant area (traffic) warned the zoning body that further investigation would be essential before anyone could say whether the specific zoning proposal would lead to a public welfare catastrophe or not—and yet the zoning body refused to take any reasonable step in that direction. Just as one example of what might have been done, the Board could easily have had its professional staff of traffic engineers do a statistical analysis of the impact which the projected "jammed conditions" at three intersections on the Pentagon City tract would have on the rest of the traffic system—and if such a statistical analysis had been made, the Board would have become aware that the proposed development would result in a total "breakdown" of the traffic system in the area. (II at 26). Moreover, if one proceeds on the assumption (as we do) that the members of the Arlington County

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[4] 42 U.S.C. § 1857c-5(a)(2)(B).

Board would have reacted rationally to that news, it seems at least highly probable that in the face of such a statistical analysis the Board would have rejected the specific development proposal put forward by the developers and directed them to go "back to the drawing board" to reformulate their plans in such a way as to alleviate the problems which they were proposing to create. But however that may be, the simple fact remains that in this case the zoning body did not perform the weighing or balancing function that must be performed if the property interests of those affected by a proposed zoning decision are to be procedurally protected.

The same point is even more clearly illustrated by the air pollution issue in this case. Not only did the Board not undertake an investigation of the matter before acting; it affirmatively decided to postpone any analysis of the problem until after its zoning decision had been made and the owners of the property had laid claim to a vested affirmative right to build the proposed project without regard to its pollutional consequences. We respectfully submit that the present record presents a suitable vehicle for advising state zoning bodies throughout the country that it is procedurally unfair and constitutionally impermissible to act first and consider the consequences later.

Finally, we should emphasize that the holding for which we contend is relatively narrow. If the Board in this case had made some reasonable investigation of the total traffic picture and the air pollutional problems involved and (in the words of the *Georgetown* case, *supra*) had then rationally "struck the balance" in *favor* of the developers' proposal, the constitutional claim asserted here would never have arisen. But that

is simply not what happened. The Board in effect abdicated its responsibility to consider and weigh and strike the balance among the various public welfare factors and property interests involved, and in so doing it denied procedural due process of law to the neighboring property owners whose property rights will be directly affected by the challenged decision.

CONCLUSION

Since this case presents a novel but serious question which has important implications in terms of urban development throughout the country, the present petition for a writ of certiorari to the Supreme Court of Virginia should be granted.

Respectfully submitted,

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December 1, 1977

APPENDIX

APPENDIX A

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

PENTAGON CITY COORDINATING COMMITTEE, INC., et al.
Plaintiffs

v.

ARLINGTON COUNTY BOARD, et al., *Defendants*

In Chancery No. 26423

Memorandum

FROM: HONORABLE PAUL D. BROWN, *Judge*

TO: RALPH BOCCAROSSE, JR., Esquire, *Counsel to Plaintiffs*
GARY L. REBACK, Esquire, *Counsel to Plaintiffs*
ROBERT B. OWEN, Esquire, *Counsel to Plaintiffs*
CHARLES G. FLINN, Esquire, *Counsel to Defendant County Board*
MARC E. BETTIUS, Esquire, *Counsel to Intervenors*
WILLIAM B. LAWSON, Esquire, *Counsel to Intervenors*

This comes upon an Amended Petition for Declaratory Judgment brought, as of trial date, by seven individuals* who live in the general area of the subject property. The Court is asked to declare null and void a zoning action of

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* The Plaintiffs are only named in the caption of the original Petition. It is undisputed that they are: John and Joan Quinn and Richard and Deborah Herbst, all of the 2200 Block of South Knoll Street, D. Derk Swain of 2300 South June Street, and Dr. and Mrs. Robert F. Steadman of Apt. A711, at 1111 Army Navy Drive. The Steadman's apartment is directly across from the subject premises. The remaining Plaintiffs live at or close to South 23rd Street about one half mile from the subject land.

Pentagon City Coordinating Committee, Inc., was heretofore struck as a Plaintiff when it appeared its membership included persons without a sufficient legal interest in the issues.

the County Board of Arlington County of February 25, 1976, together with the approval of Part I of a Phased Development Site Plan, as having been passed and approved arbitrarily and capriciously.

In granting in part a Motion to Strike at the end of Plaintiffs' case, the Court has decided against the Plaintiffs' contention that the County Board failed in a gross manner to consider the zoning. The same ruling denies the Plaintiffs' contention that the governing body was unable to exercise free choice whether to change the zoning or not because of legal advice it was thought to have received.

The heart of the complaint is that the zoning was arbitrary and capricious because it created problems of air pollution and automobile congestion.

The subject property is some 116 acres in size. It lies across Interstate 95 from the Pentagon building. It is the last tract of land anywhere near its size available for development in the Jefferson Davis Highway corridor.* The Metro subway under construction has a curve in its line with a stop for this land as part of the 1968 plan of the Washington Metropolitan Area Transit Authority. The corridor is that portion of Jefferson Davis Highway (U.S. 1) from Interstate 95 south to an access road across railroad tracks. The access road leads to Washington National Airport.

Statutory standards for consideration in zoning legislation are set forth in Code sections 15.1-427, 15.1-489 and 15.1-490.

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* Another area which may be developed under the name "Airport City" was considered by all experts in computing the future generation of traffic. Photographic exhibits suggest major problems because of the railroad lines of the R. F. and P. owners.

The Court has had the benefit of twelve days and two evenings of testimony with a large number of detailed exhibits and of a one-and-one-half hour view by car of the area involved.

The issue is not whether the Court favors or does not favor the building of the proposed "Pentagon City". The issue is whether the County Board in enacting the zoning legislation acted in a manner which was clearly unreasonable, arbitrary or capricious and without reasonable or substantial relation to the public health, safety, morals or general welfare. A further legal principle involved is that: "The Court will not substitute its judgment for that of a legislative body, and if the reasonableness of a zoning ordinance is fairly debatable, it must be sustained." *Fairfax County* v. *Allman*, 215 Va. 434 (1975).

The Court finds that the reasonableness of the zoning and site plan action was clearly debatable. Accordingly, it is sustained and the prayers of the Petitioners are denied.

In reaching this conclusion, the Court decides that the Plaintiffs, or some of them, are sufficiently situated as occupants and landowners of the subject premises that they have a right to raise the complaint herein made without being limited, as the County says, to a right to complain only of spot zoning.

The plaintiffs have not proved in terms of dollars that their specific property interests will be harmfully affected by the increased traffic. Assuming, but not deciding, as regards traffic, that the Plaintiffs have a right to complain of congestion at the borders of the zoned land as distinguished from at their own residences, a further examination will be made of this contention.

As regards pollution, while noise pollution was alleged no evidence was proferred in this area. As to air pollution, complaint is pinpointed as to two of five major categories of air pollutants, namely, carbon monoxide and photochemical oxidants.

As regards carbon monoxide, the evidence shows the greatest danger to be in close proximity (two meters) to the auto exhausts. No evidence shows a direct level or effect of these fumes at the homes of the Plaintiffs. Witness Biggs, a meteorologist, does predict excessive levels by 1990. In any event, the evidence shows further that the State Pollution Control Board will require under any development of the subject property, at the building permit issuance stage, a showing that certain levels of carbon monoxide pollution will not be exceeded. While the County Board does not have to rely on this control, nevertheless it may and still act reasonably.

Photochemical oxidants are complex in nature. Motor vehicle exhaust emissions combine in the air with other things and under further conditions of temperature, humidity and sunlight merge and interact to product the polluting oxidants. This type of pollution is an area one in terms of many miles and the evidence is that some causes may be as much as 100 miles away. No State or local standards were shown to exist limiting the creation of the element of photochemical oxidants which comes from motor vehicles. It has been shown that the Federal Government, through its Environmental Protection Agency, has established standards of air purity. The Plaintiffs produce evidence that these will be violated in what is called the "horizon year". The horizon year in this case is taken to be approximately 1990 and is that year in which, if zoning is sustained and building proceeds as expected, the last of contemplated construction will have been finished. Evidence on behalf of the Defendant Board and intervening property owners is to the contrary. First, reasonable men may differ as to whether this pollutant will violate standards in the horizon year. Secondly, the Plaintiffs have been unable to show that man's knowledge of this kind of pollutant as of the zoning date was such that the zoning of a thirty two million dollar property should be delayed for a year or more to the end that background levels could be

determined and the possibility of future harmful effect more accurately known. On the evidence presented the Court finds that the state of the art at the time was insufficient to mandate the denial or long delay of the requested zoning and site plan.

A study compared the traffic generation if this property were located off a Metro station as against the existing facts. If the assumption is accepted that growth will occur somewhere, then the study shows that there would be fifteen percent more traffic generated off a Metro line with increased congestion and pollution implications.

The complaints of air pollution must fail.

Turning to the issue of traffic congestion: This is clearly one of the proper and necessary concerns in zoning actions. The complaint pinpoints three intersections and asserts there will be intolerable congestion in the horizon year to the point that, it is argued, the passage of the zoning change was arbitrary and capricious. One intersection involves Hayes Street at Army Navy Drive, a border intersection which apparently will never be developed north of Pentagon City and part of which becomes two ramps which enter I-95 southbound. Two other intersections are on Eads Street at 15th, a border of the property, and Eads Street at 18th Street, one long block out of the property.

Where U.S. 1 continues at grade at present or where it may become an elevated road to be known as Interstate 595, there will be no provision for traffic to make a left turn from I-595 to go southbound into Virginia at I-95. It will simply feed due north towards the Pentagon and Rosslyn, or towards the District of Columbia. Therefore, the large volumes of traffic generated by a row of three developments east of U.S. 1, the National Center, Crystal City and Jefferson Plaza, together with the possible "Airport City" east of them will have to send much of their southbound traffic over 15th and 18th Streets and through Pentagon

City to reach I-95. Other vehicles will travel south on U.S. 1 (I-595) where some of them now turn right and will use 23rd Street south through the area of the homeowner Complainants. Still other traffic will continue to go south to Glebe Road where it commences on the right and eventually crosses southbound I-95 at another interchange.

To restate the situation, existing and possible future development will send much traffic through Pentagon City to the end that sixty percent of the traffic on its streets and border intersections will have been generated elsewhere. Even with the opening of 12th Street South through the subject land and with major highway changes and improvements to State urban standards, a traffic report known as the Pratt Report, prepared in connection with the *proposed* zoning, showed that at three of the intersections an "F" level of service would obtain at the three intersections in the workday morning and evening peak hours only. (Exhibit P-10A, p. 30) The excess percentage projected varied from two to thirteen percent above the rated maximum capacity of each intersection. A Pratt restudy *as zoned* shows internal traffic generation down for in and out load at peak hour of twenty one percent and eighteen percent. The result is muted by external traffic of sixty percent or more. (Exhibit D-10)

The experts have disagreed as to what conditions obtain when an 'F" level of service is reached.* Qualified

* An E level of service becomes an F level when 100% of rated capacity is passed. A small excess would exhibit little difference from an E level of service. A large excess could mean totally jammed conditions. See the Highway Capacity Manual, Exhibit P-11, p. 80-81 and p. 129-131. One witness points to an intersection working adequately at Key Bridge over the Potomac at 166% of its rated capacity. No method exists to measure the "damping effect" caused by drivers' knowledge of heavy traffic at given intersections. This effect causes drivers to find alternate routes. It is well known to traffic engineers but depends on the availability of alternate routes.

experts disagree in this case as to whether any F levels will be reached. For example, Pratt notes that he was required to assume that all new traffic would be kept away from existing residential areas, placing greater volumes on the subject property. He notes further constraints on his study which raised the projection of volume of traffic more than he felt was reasonable. The County Highway Engineer does not anticipate F levels will exist and points to four existing intersections generally comparable in size and loads, as evidence that his opinion is correct. On the other hand, the Complainants produce three experts who say the level of congestion will range from 122% to 157% higher than intersection capacity in one direction at one of the two peak hours per workday. They argue that a premise of Traffic Engineer Pratt that for capacity purposes only one intersection should be classified "central business district" as opposed to some less densely settled district. The result, under Exhibit P-11, a Highway Capacity Manual much used in the field, would throw into the computations the numeral 1.25 as compared to the numeral 1, with the result that the Pratt forecast would have to be increased by twenty five percent. The Complainants say that the Pratt figures, as adjusted for less density after adoption of the zoning, must nevertheless be increased by twenty five percent to show the true problem which they believe is certain to exist in the horizon year. The County and intervening property owners respond that the site plan reduces "friction" by off street loading, etc., in a manner unknown to the 1965 Highway Capacity Manual and that even if an F level of service is reached there are things which can be done to alleviate the condition. For example, Eads Street can be made a through street parallelling U.S. 1 not only to Glebe Road but also further south across Four Mile Run to a major road in the City of Alexandria.

Thus, the experts disagree as to the premises undergirding the projections of how much traffic there will be.

They disagree as to the conclusions of how much traffic congestion will result. They disagree as to whether remedies will be available. When qualified experts are in genuine disagreement in their forecasts of conditions in 1990, then for the County Board to accept one view or the other is neither arbitrary nor capricious.

The evidence shows the County has a conscious policy to place high density development close to Metro stops and to retain other areas for low density residential uses. This is common sense. Demands for growth are met. In the county as a whole there is less pollution and traffic congestion from the growth. Metro is better used with the prospect of lower taxation of the citizens for operating subsidies.

The subject tract has a history of high density zoning. Because site plan approval has as great an impact as the act of zoning, the Court can only give its net impression of the changes. The property went from high density zoning through an application for a still higher density zoning. The County Board cut back the request so that the net result was, relatively speaking, a minor increase in density. For example, the applicants sought two million square feet of office space and were granted 1.25 million. Their request for hotel-motel units was increased. One effect was to reduce the rush-hour traffic densities. A simplified comparison of the changes is found in Exhibit D-10.

The Defendants point to a 1976 report of the National Capitol Region Transportation and Zoning Board of the Metropolitan Washington Council of Governments (an agency created by the various jurisdictions of Washington, D.C., and environs) which shows that in the year 1992 in the area fifty percent of all vehicle miles travelled will be at capacity levels "E" or "F". They note that while vehicle miles include open highway mileage, the area is nevertheless urban and that intersections will be

the cause of most of this expected problem. Thus they say that the most pessimistic forecast for Pentagon City at its three busiest intersections is no worse than the forecast for half the general Washington, D.C., area, even after various alternative traffic and Metro improvements estimated to cost 5.3 billion dollars have been calculated into the dismal area forecasts.*

Finally, the positive aspects of the total zoning and site plan approval for the citizens of the County generally were summarized primarily by witness Dewberry:

There will be less pollution and congestion with balanced development with development at this Metro location as opposed to a non-Metro location.

The needs for growth and for an increased tax base are further met.

The increase in density was minimal in the light of the value of concessions of the property owners.

A coordinated development of 116 acres at one time will now occur so that all utilities and streets ultimately needed will be supplied by block face as the first building is constructed in the block. Problems found in the development of the Rosslyn area of Arlington will be avoided or minimized.

All parking will be off street, as will be commercial loading and unloading. This reduces "friction" and achieves higher traffic volume capacity.

A new street will be opened—12th Street. Blocking Hayes Street and creating a sharp angle in Joyce Street will restrict traffic flows into single family residential areas.

The developers will donate twelve acres for a park.

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* Oddly, as a witness noted, the worse traffic congestion becomes, the more Metro will be used.

Low-rise development buffers existing residential areas.

Portions of the site for a library and fire station have been donated by the developers.

The zoning is consistent with the land use plan, the Jefferson Davis corridor plans, the policy of the County as to development at Metro sites and with the history of zoning of the site.

The zoning is not all CO as was Rosslyn and Crystal City.

The rearrangement of the location of commercial, office and residential uses improves the use of the Metro station.

A nursing home will be developed.

Some housing for the elderly will be developed.

Some townhouse family development will occur.

The zoning is less intense than the rezoning with site plan approval of the adjacent Stone and Davy tracts concurrently approved.

No displacement of population will occur.

Site plan approval carried 60 conditions including such further matters as minimum ten foot pedestrian corridor access radiating through the blocks around Metro, and tree plantings along the streets.

Overall the zoning action has not been proved to be arbitrary and capricious. The result is to sustain the action of the County Board and to deny the prayers of the Amended Petition for Declaratory Judgment. Prevailing counsel should prepare a Decree for endorsement and presentation for entry.

_____

Judge

December 23, 1976.

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

PENTAGON CITY COORDINATING COMMITTEE, INC., ET AL,
Plaintiffs,

v.

ARLINGTON COUNTY BOARD, ET AL., *Defendants.*

In Chancery No. 26523

Order

THIS CAUSE came on to be heard on the 15th day of November, 1976, upon the Plaintiffs amended petition for declaratory judment, upon the pleadings previously filed, upon the exhibits submitted and received in evidence, upon the court's hearing of testimony *ore tenus* and upon written and oral arguments of counsel for the Plaintiffs, the Defendant intervenor landowners, and the Defendant Arlington County Board.

After mature consideration of all of the aforesaid matters, the court is of the opinion as stated in the 12 page *Memorandum* dated December 23, 1976, that the zoning action of the Arlington County Board of February 25, 1976, complained of by the Plaintiffs, has not been proved to be arbitrary and capricious, and it is therefore

ORDERED, ADJUDGED and DECREED that the amended petition for declaratory judgment is denied with prejudice.

THIS ORDER IS FINAL.

ENTERED this 7th day of January, 1977.

PAUL D. BROWN, *Judge*

WE ASK FOR THIS:

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APPENDIX B

CORRECTED COPY

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday, the 28th day of July, 1977.

The petition of Pentagon City Coordinating Committee, Inc., John H. Quinn, Joan C. Quinn, D. Derk Swain, Richard J. Herbst, Deborah Herbst, Robert F. Steadman and Calista L. Steadman for an appeal from an order entered by the Circuit Court of Arlington County on the 7th day of January, 1977, in a certain declaratory judgment proceeding then therein depending, wherein the said petitioners were plaintiffs and Arlington County Board and others were defendants, having been maturely considered and a transcript of the record of the order aforesaid seen and inspected, the court being of opinion that there is no reversible error in the order appealed from, doth reject said petition, and refuse said appeal, the effect of which is to affirm the order of the said circuit court.

Record No. 770610

A Copy,

Teste:

Howard G. Turner, *Clerk*
By: /s/ ALLEN L. LUCY,
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday, the 2nd day of September, 1977.

Record No. 770610

PENTAGON CITY COORDINATING COMMITTEE, INC., ET AL.,
Appellants,

against

ARLINGTON COUNTY BOARD, ET AL., *Appellees.*

Upon a Petition for Rehearing

On mature consideration of the petition of the appellants to set aside the decree entered herein on the 28th day of July, 1977, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ HOWARD G. TURNER, *Clerk*